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June 12, 2009

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COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 JUN 12 PM 3:22
CHIEF CLERKS OFFICERe: Administrative Law Judges' Request to Answer Certified Questions;
SOAH Docket No. 582-08-1700; TCEQ Docket No. 2008-0091-UCR
*TCR Highland Meadow Limited Partnership v. Clear Brook City Municipal
Utility District*; Before the State Office of Administrative Hearings

Dear Ms. Castanuela:

Enclosed please find for filing an **original and seven (7) copies** of *TCR Meadow Limited Partnership's Brief to Commissioners on Six Certified Questions Regarding Texas Water Code § 49.2122*.

Thank you for your attention to this matter.

Sincerely,

HOOVER SLOVACEK LLP



Dylan B. Russell

cc:

Hon. William G. Newchurch
Hon. Kerri Jo Qualtrough
Hon. Henry D. Card
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**TCEQ DOCKET NO. 2008-0091-UCR
SOAH DOCKET NO.582-08-1700**

**TCR MEADOW LIMITED
PARTNERSHIP**
Petitioner

BEFORE THE STATE OFFICE

v.

OF

**CLEAR BROOK CITY MUNICIPAL
UTILITY DISTRICT**
Respondent

ADMINISTRATIVE HEARINGS

**TCR MEADOW LIMITED PARTNERSHIP'S
BRIEF TO COMMISSIONERS ON
SIX CERTIFIED QUESTIONS
REGARDING TEXAS WATER CODE § 49.2122**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

TCR MEADOW LIMITED PARTNERSHIP ("TCR") files this Brief to the Commissioners (the "Commission") on Six Certified Questions Regarding Texas Water Code § 49.2122, and would show as follows:

**"Of two equivalent theories or explanations,
all other things being equal,
the simpler one is to be preferred."
- Occam's razor¹**

In light of the foregoing, and the arguments and authorities discussed below, the Commission should answer the first three of the six certified questions regarding Texas Water Code § 49.2122, the remaining three questions being rendered moot, as follows:

Question 1: No.

Question 2: No.

Question 3: Yes.

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COMMISSION
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QUALITY
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CHIEF CLERKS OFFICE

¹E.g., *Casarez v. Val Verde County*, 16 F. Supp. 2d 727, 729 (W.D. Tex. 1998) (invoking the lesson of Occam's razor, meaning "Don't complicate things any more than is required" or "Keep it simple").

I. SUMMARY OF POSITION

A. The Simple, Correct Answers

1. The simplest explanation is that Section 49.2122(b) and Section 13.043(j) are not in conflict and that Section 49.2122(b)—consistent with its title: “ESTABLISHMENT OF CUSTOMER CLASSES”—only creates a presumption that customer classes established by a district are properly established absent a showing that the district action establishing the classes was arbitrary and capricious.

2. If the Commission agrees with simplest, most logical construction of Section 49.2122(b), as noted above, then Question 1 is answered “No,” Question 2 is answered “No,” Question 3 is answered “Yes,” and the remaining questions are rendered moot, as they are contingent upon the Commission answering “Yes” to Question 2.

3. Under this approach, Section 49.2122 and Section 13.043(j) can be harmonized, and moreover, the TCEQ’s duties and the standards under Section 13.043(j) remain intact, and the longstanding policies and procedures set out in Chapter 13 of the Water Code and in 30 TEX. ADMIN. CODE § 291 remain unchanged.

B. The Wrong Answers

4. On the other hand, if Question 2 is answered “Yes,” construing Section 49.2122(b) to create a presumption that rates set by a district are just and reasonable absent a showing that the district action setting the rates was arbitrary and capricious, then Section 13.043(j)—requiring that the TCEQ “ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly shall be just and reasonable”—is in direct conflict with Section 49.2122(b).

5. Furthermore, if Question 1 is answered “Yes” because there is conflict between Section 49.2122(b) and some other chapter in the Water Code (such as Chapter 13), Section

49.002(a) provides that "the specific provisions in such other chapter or Act shall control." Thus, if Questions 1 and 2 are answered "Yes," and thus Section 49.2122(b) and Section 13.043(j) are in conflict, then, according to Section 49.002(a), Section 49.2122 does not apply and Section 13.043(j) controls. It is unlikely that the Legislature enacted Section 49.2122 only to be cast aside by Section 49.002(a).

6. Alternatively, if Question 2 is answered "Yes," and the Commission somehow concludes that Section 49.2122(b) does *not* conflict with Section 13.043(j), answering Question 1 "No," then the Commission will:

(1) ignore the TCEQ's duty to ensure that rates are just and reasonable under Section 13.043(j) and 30 TEX. ADMIN. CODE § 291.41(i);

(2) reverse the longstanding procedural rule under 30 TEX. ADMIN. CODE § 291.12, which provides that the "the burden of proof shall be on the provider of water and sewer services to show that the proposed change . . . is just and reasonable";

(3) disregard and rewrite the "comprehensive regulatory system" set forth in Chapter 13 of the Texas Water Code designed "to assure rates, operations, and services that are just and reasonable to the consumers";² and

(4) step on the Legislature's toes and create a standard for judging rates, as posed by Question 5.

Such an interpretation of Section 49.2122 would be contrary to the most basic rule of statutory construction that "courts should not assign a meaning to a provision that would be inconsistent with other provisions of the act." *Clint Indep. Sch. Dist. v. Cash Invs.*, 970 S.W.2d 535, 539 (Tex. 1998) (emphasis added).

7. TCR just received the Executive Director's Brief on Certified Questions. It proposes the opposite construction of TCR that Question 2 should be answered "Yes" and Question 3 should be answered "No." Ironically, it admits in its "Implications" section that when construed the way

²TEX. WATER CODE § 13.001(c).

it proposes 49.2122 “significantly alters the manner in which appeals for district rate-setting actions are conducted,” which it says will have the “practical effect” of making it “more difficult for ratepayers to successfully appeal a district action affecting their water or sewer rates.”³ This certainly does not sound consistent with the rule that the Commission “should not assign a meaning to a provision that would be inconsistent with *other* provisions of the act.” *Clint Indep. Sch. Dist.*, 970 S.W.2d at 539. It also does not sound consistent with the duties under Section 13.043(j) that the TCEQ “shall ensure that every rate made . . . shall be just and reasonable.”

C. Cut with Occam’s Razor

8. To avoid taking such drastic measures, it is “[b]est to take Occam’s Razor and slice off needless complexity.”⁴ “Using Occam’s Razor, the simple and obvious explanation”⁵ is that Section 49.2122(b) does *not* alter “the TCEQ’s regulatory process over district ratemaking by creating a presumption in all types of cases that a district’s rates are presumed valid,” as the ALJs have framed the ultimate issue for the Commission on the second page of their Request for Answers to Certified Questions. Applying this principle, the Commission should answer the questions as follows:

Question 1: No.

Question 2: No.

Question 3: Yes.

Question 4: Moot.

Question 5: Moot.

Question 6: Moot.

³On the other hand, another practical effect not mentioned by the TCEQ, but one that can reasonably be implied, is the TCEQ’s workload will certainly be reduced if ratepayers have will have a “more difficult” time successfully appealing a district’s actions.

⁴*E.g. CFTC v. Zelener*, 373 F.3d 861, 868 (7th Cir. 2004).

⁵*E.g., Brown v. Vance*, 637 F.2d 272, 281 (5th Cir. 1981).

II. FACTS

A. *The 2004 Rate Dispute Between TCR and the MUD*

8. It is important to note that the impetus for the enactment of Section 49.2122 was the prior dispute between TCR and the Clear Brook City Municipal Utility District ("MUD"). That dispute resurfaced and is currently pending before the TCEQ as a result of the MUD's decision to re-increase water rates for TCR, with the MUD using Section 49.2122 as a shield.

9. The prior dispute occurred in 2004, when TCR, an owner of a 250 unit apartment community, filed suit against the MUD in a case styled *TCR Meadow Limited Partnership v. Clear Brook City Municipal Utility District*, Cause No. 2004-21026, in the 334th Judicial District Court of Harris County, Texas (the "District Court Case"). TCR filed suit asserting among other things that the MUD's water rates were unreasonable and unjustified, and thus illegal.

10. At that time, the MUD was charging TCR \$25.00 per unit for the first 7,000 gallons of water while charging single family residential customers only \$15.00 for the same 7,000 gallons. TCR asserted that this disparity in rates was unreasonable because the MUD admitted that its costs of providing water services to apartments were *less* than its costs for single family residential customers.

11. According to the MUD, the \$10.00 increased rate for apartments was based solely on the MUD's perception that apartment communities were not paying their fair share of tax revenues as compared to single family homes. Thus, the MUD thought it was appropriate to subsidize the perceived tax revenue disparity by charging apartments more for the same amount of water. One among many flaws in the MUD's rationale was its comparing an apartment unit to a single family home. In other words, the MUD's perceived tax revenue disparity only existed if the MUD considered an apartment unit the same as a single family residential home with respect to tax revenue. By ignoring their obvious and significant differences (e.g., market value, square footage,

and existence of yards and other amenities), the MUD could rationalize their perception that apartment units were not paying their fair share in tax revenues, which in turn gave it justification to single out apartments with the increased water rate.

12. Ultimately, Judge McCally in the District Court Case did not buy the MUD's argument. After a bench trial, the court issued findings of fact and conclusions of law declaring that the MUD's rates were "unlawful," and that the MUD "acted arbitrarily and illegally" in setting higher rates for apartments to "correct a perceived inequity in the [MUD's] tax structure."⁵

13. Instead of proceeding to a final judgment, however, the parties settled the dispute, and per the settlement agreement, the MUD set water rates at \$16.50 for the first 7,000 gallons of water for both apartments and single family residential customers. Apparently still frustrated with the decision in the District Court Case, believing that the judge incorrectly applied the law, the MUD contacted its local Texas state representative, Robert Talton, in an effort to "clarify" the current law regarding the manner in which municipal utility districts could establish differing fees among various customer classes. The result: Section 49.2122 of the Texas Water Code.

B. Same Difference? - Custom Class Dispute v. Rate Dispute

14. The District Court Case was ultimately a rate dispute, not a dispute regarding customer classes. To be sure, TCR asserted in the District Court Case that it was being treated unfairly with respect to the water rate charged to its customer class, apartment communities. TCR was not arguing, however, that the MUD could not establish different customer classes, charge different rates to the customer classes, or consider differing costs associated with each customer class in setting rates. What TCR contended was that the MUD could not charge apartments a higher rate when all of the evidence suggests that the costs related to the charged-for service were less for

⁵ A true and correct copy of the Findings of Fact and Conclusions of Law are attached hereto as **Exhibit A** and are incorporated herein for all purposes.

apartments than another class of customer that had a much lower rate. In other words, the increased rate to apartments was unjust and unreasonable because it was admittedly⁶ not related to the cost of services provided. Simply stated, every ratepayer is a member of a customer class, unless the district makes no distinction between or among classes of customers when charging for water. That does not mean that every water rate dispute by a ratepayer of a particular customer class is a customer class dispute.

C. The TCEQ, the ALJs, Confusion, and Texas Water Code 49.2122

15. The very day that Section 49.2122 became effective, September 1, 2007, the MUD adopted a new rate order, again increasing rates for apartments by \$6.14 above the rate it charged for single family homes. Notably, the \$6.14 increase is the perceived shortfall in tax revenues that the MUD receives from apartments as compared to single family residential customers. In response, TCR filed its petition in the TCEQ under Chapter 13 of the Water Code, which is now pending.

16. As TCR proceeded with issuing document requests, the MUD objected that certain requests were not relevant since TCR had not pleaded that the MUD's rates were arbitrary and capricious under Section 49.2122. The MUD argued that unless TCR pleaded that the MUD had acted arbitrarily and capriciously, in order to overcome the presumption in 49.2122(b), then whether the MUD's rates were just and reasonable was not relevant. In connection with TCR's motion to compel, and after having presented arguments on the meaning of Section 49.2122, ALJ Newchurch issued his first ruling on the matter, Order No. 6, which made numerous findings construing Section 49.2122(b) some of which are as follows:

⁶Notably, the MUD again admits in the pending case before the TCEQ that its costs and expenses in providing water and sewer service to apartment unit users is less than for single-family residential users. A true and correct copy of the MUD's Responses to Request for Admissions are attached hereto as **Exhibit B** and are incorporated herein for all purposes.

- “[T]o the extent that there is a conflict between them, Water Code § 49.2122(b) prevails over Water Code § 13.043(j).”
- “[C]oncludes that one acts unjustly and unreasonably if one acts arbitrarily and capriciously.”
- “Water Code § 49.2122(a) . . . does not mean that a district may set rates that are unjust or unreasonable to members of any class.”
- “‘Notwithstanding any other law [language in Section 49.2122(a)]’ only means that a district has broad discretion to establish rate classes, not that it may set unjust and unreasonable rates for a particular class of customers.”
- “Water Code § 49.2122(b) creates a presumption that [districts’] rates are just and reasonable.”

17. Many of ALJ Newchurch’s conclusions are contradictory. For example, he concludes that a district may not “set unjust and unreasonable rates for a particular class of customers,” but concludes that “Water Code § 49.2122(b) creates a presumption that [districts’] rates are just and reasonable.” Under ALJ Newchurch’s analysis, if a ratepayer cannot show that the district acted arbitrarily and capriciously, then the presumption stands, and the rates are deemed just and reasonable, whether they actually are not. Thus, under ALJ Newchurch’s interpretation, a district *can* “set unjust and unreasonable rates for a particular class of customers” as long as a ratepayer cannot show that the district did so arbitrarily and capriciously.

18. By way of further example, ALJ Newchurch’s ruling that Section 49.2122(b) controls in the event of a conflict between Section 49.2122(b) and Section 13.043(j) is contrary to Section 49.002(c), which provides that Section 13.043(j) would control over Section 49.2122(b).

19. ALJ Qualtrough’s Order No. 3 differs significantly from ALJ Newchurch’s Order No. 6 and Order No. 7, as follows:

- “The legislative history cited by the MUD suggests that section 49.2122(b) applies only to the process of a district’s designation of classes of ratepayers.”

20. ALJ Card's Order No. 3 also differs significantly from ALJ Newchurch's Order No.

6 and Order No. 7, as follows:

- "[T]he meaning of Section 49.2122(b) is ambiguous."
- "Although that subsection itself does not contain the phrase 'among classes of customers,' it exists in the context of a section that pertains to the establishment of customer classes. Its reference to 'charges, fees, rentals and deposits' is identical to the language of subsection (a), which explicitly governs differences among customer classes. That context and language raise questions concerning the scope and meaning of that subsection. The legislative history . . . supports the narrower interpretation they espouse."
- "[T]he Legislature would more clearly explain its meaning if it intended for LCRA and other districts to be immune from any rate appeals unless they were shown to be arbitrary and capricious."
- "The ALJ concludes TEX. WATER CODE ANN. § 49.2122(b) does not require Appellants to prove that LCRA acted arbitrarily and capriciously in establishing rates."
- "LCRA has the burden of proving its rates to be just and reasonable."

III. CERTIFIED QUESTIONS: THE COMMISSION'S ROLE

21. Needless to say, the Legislature did not choose the best phraseology in enacting Section 49.2122. Unless and until the Legislature decides to reword it, the Commissioners must do their best to construe it, applying the standards for statutory construction and plain common sense. "The courts will ordinarily adopt and uphold a construction placed upon a statute by an executive officer or department charged with its administration, if the statute is ambiguous or uncertain, and the construction so given it is reasonable." *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944). "[T]he contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight." *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 196 (Tex. 1994).

22. In light of the foregoing, the Commissioners' answers to these questions will likely have a significant impact on the construction and application of Chapter 13 of the Texas Water Code

including Section 13.043(j) as well as Section 49.2122 in many future cases before the TCEQ and in courts across Texas, in addition to those currently pending before the TCEQ. As such, great care must be taken in answering the questions certified by the ALJs.

IV. HOW THE QUESTIONS SHOULD BE ANSWERED AND WHY

QUESTION 1: IS TEXAS WATER CODE SECTION 49.2122 SO INCONSISTENT WITH TEXAS WATER CODE SECTION 13.043(j) THAT THE TWO STATUTORY PROVISIONS CANNOT BE HARMONIZED?

ANSWER: No.

23. TCR contends that if Section 49.2122(b) is properly construed, Section 49.2122(b) and Section 13.043(j) can be harmonized. If, however, Section 49.2122(b) is construed too broadly, then it will conflict with Section 13.043(j), rendering Section 49.2122(b) superfluous pursuant to Section 49.002(a), which provides that Chapter 13 controls over Chapter 49 in the event of a conflict between the two chapters.

24. Section 49.2122(b) should be construed such that it is not in conflict with Section 13.043(j). To be sure, in determining the meaning of a statute, the court must "consider the statute as a whole and construe it in a manner which harmonizes all of its various provisions." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 19 (Tex. 2007). Moreover, "courts should not assign a meaning to a provision that would be inconsistent with other provisions of the act." *Clint Indep. Sch. Dist. v. Cash Invs.*, 970 S.W.2d 535, 539 (Tex. 1998).

25. As discussed below, TCR will show that applying the applicable rules for statutory construction, it is clear that the Legislature did not intend that Section 49.2122(b) would supplant the longstanding duty of the TCEQ to ensure that rates are just and reasonable under Section 13.043(j) and 30 TEX. ADMIN. CODE § 291.41(i), the longstanding procedural rule under 30 TEX. ADMIN. CODE § 291.12 that the "the burden of proof shall be on the provider of water and sewer services to show that the proposed change . . . is just and reasonable," or the longstanding

"comprehensive regulatory system" under Chapter 13 of the Texas Water Code enacted "to assure rates, operations, and services that are just and reasonable to the consumers." TEX. WATER CODE § 13.001(c).

QUESTION 2: DOES TEXAS WATER CODE SECTION 49.2122(b) CREATE A PRESUMPTION THAT RATES SET BY A DISTRICT ARE PROPERLY ESTABLISHED ABSENT A SHOWING THAT THE DISTRICT ACTION SETTING THE RATES WAS ARBITRARY AND CAPRICIOUS?

ANSWER: NO.

26. TCR contends that the answer to Question 2 is the most significant because its answer will dictate how Questions 1 and 3 must be answered and thus whether Questions 4, 5, and 6 even need to be answered. Section 49.2122(b) provides as follows:

A district is presumed to have weighed and considered appropriate factors and to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.

TCR contends that this section, when applying the rules of statutory construction, does *not* mean that districts are freed from their longstanding duty to provide water rates that are just and reasonable unless and until a ratepayer proves that the district acted arbitrarily and capriciously in setting its rates. Therefore, the Commission should answer "No" to Question 2.

27. The "sole objective in construing [a statute] is to give effect to the Legislature's intent." *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). "To determine the Legislature's intent, we look to the statute's plain language and the common meaning of the statute's words." *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006). Additionally, "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and

emergency provision.” TEX. GOV’T CODE § 311.023; *accord Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 350 (Tex. 2000).

28. Applying these standing, as discussed in detail below, it is clear that the Legislature did not enact Section 49.2122(b) to “create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious.”

A. *The Language of 49.2122 as a Whole Suggests that Section 49.2122(b) Only Creates a Presumption Regarding the Manner in Which a District Establishes Rates Among Customer Classes, Not that District’s Rates Are Presumed Just and Reasonable Unless Shown to Have Acted Arbitrarily and Capriciously*

29. Arbitrary is defined as “[i]n an unreasonable manner” or “willful and unreasoning action, without consideration and regard for facts and circumstances presented.” BLACK’S LAW DICTIONARY 104 (6th ed. 1990) (emphasis added). On the other hand, unjust means “[c]ontrary to right and justice,” and unreasonable means “[i]rrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid” or “immoderate; exorbitant.” *Id.* at 1535, 1538.

30. Considering the foregoing definitions and looking at key language in Section 49.2122(b), which is italicized below for emphasis, it is clear that the presumption created in that subsection only applies to the district’s *actions* in setting fees and charges among customer classes but not to the rates in and of themselves, as follows:

A district is presumed to have *weighed* and *considered* appropriate factors and to have properly *established* charges, fees, rentals, and deposits absent a showing that the district *acted* arbitrarily and capriciously.

The italicized are all verbs, words that express actions. Thus, the presumption in Section 49.2122(b) only applies to a district’s *actions* in establishing charges or fees as to a particular customer class, such as whether factors were considered or not and whether any such factors were relevant in establishing customer classes and any differing fees among them. This conclusion is correct because the only way to overcome the presumption in Section 49.2122(b) is to show that the district “acted arbitrarily and capriciously.”

31. Simply put, a showing that the rate in and of itself is unreasonable or unjust does not necessarily establish that the district acted arbitrarily and capriciously in arriving at the rate for a particular customer class. For example, in the District Court Case, the MUD's impetus for enacting Section 49.2122, Judge McCally concluded the following:

With regard to the June, 2000, rate increase, the District had no factual basis or support for discriminating between the categories of customers. This is not to say that such a basis or foundation does not or could not exist; the District simply did not look.

In other words, the court suggested that the MUD's rates could have been perfectly reasonable and just, but without looking for any factual basis to confirm whether the rates were reasonable or just, the MUD acted arbitrarily and capriciously in setting TCR's rates so high. The court concluded the MUD's means (in failing to look at the facts) was arbitrary, without passing judgment on the reasonableness of the ends (the rate).

32. Moreover, if the Legislature really intended to create a presumption regarding the justness and reasonableness of rates set by districts, the most logic place to amend the Water Code would have been in Chapter 13, entitled "WATER RATES AND SERVICES." Instead, the Legislature chose to "clarify Section 49.212 by *codifying current law governing* the ability of MUD's to charge differing fees and charges to different classes of customers." Chapter 49 is entitled "PROVISIONS APPLICABLE TO ALL DISTRICTS."

33. At the very least, if the Legislature intended to create a presumption regarding the justness and reasonableness of rates it could have written Section 49.2122(b) to start as follows:

A district's rates are presumed to be just and reasonable absent

The Legislature did not, and "every word excluded from a statute must also be presumed to have been excluded for a purpose." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981). Therefore, Section 49.2122(b) cannot be construed as establishing a presumption regarding the reasonableness of rates. As Judge Card put it in his March 29, 2009 Order No. 3, "the

Legislature would more clearly explain its meaning if it intended [districts] to be immune from any rate appeals unless they are shown to be arbitrary and capricious.”

B. The Title, Preamble, Legislative History, Object Sought to Be Obtained, and the Circumstances Under Which It Was Enacted All Suggest that Section 49.2122(b) Only Creates a Presumption Regarding the Establishment of Customer Classes, Not that District's Rates Are Presumed Just and Reasonable Unless Shown to Be Arbitrary and Capricious

34. According to Representative Robert Talton's statements during the March 28, 2007 hearing before the Natural Resources Committee on H.B. 2301, Section 49.2122 “clarifies 49.212 by codifying basically current law” regarding how districts may set different rates “to different customer classes for water.”⁷ Similarly, the Bill Analysis for H.B. 2301 provided that Section 49.2122 “would allow a district to establish different fees among classes of customer based on any factors the district considers appropriate.”⁸ According to the Preamble, Section 49.2122 was enacted to clarify the “authority of special districts to establish differences in rates between customer classes.”⁹ Furthermore, according to the “Talking Points HB 2301” by Representation Talton, “HB 2301 seeks to clarify 49.212 by *codifying current law governing* the ability of MUD's to charge differing rates to different classes of customers.”¹⁰

35. Most significantly, the last sentence of the “Talking Points HB 2301” provides that “HB 2301 does not allow for MUD's to raise rates arbitrarily by requiring appropriate reasoning to be employed in restructuring rates between customer classes.” Again, this statement clearly shows

⁷A true and correct copy of a transcript of the March 28, 2007 hearing before the Natural Resources Committee on H.B. 2301 is attached hereto as **Exhibit C** and are incorporated herein for all purposes.

⁸A true and correct copy of the Bill Analysis for H.B. 2301 is attached hereto as **Exhibit D** and are incorporated herein for all purposes.

⁹A true and correct copy of H.B. 2301 is attached hereto as **Exhibit E** and is incorporated herein for all purposes.

¹⁰A true and correct copy of “Talking Points HB 2301” by Representation Talton is attached hereto as **Exhibit F** and is incorporated herein for all purposes.

that Section 49.2122(b) requires districts apply "appropriate reasoning" in establishing differing rates among customer classes, but it does not suggest that districts' rates are presumed appropriate in and of themselves.

C. The Consequences of Construing Section 49.2122(b) to Create a Presumption Regarding the Reasonableness and Justness of Rates Would Render the Common Law (Chapter 13 of the Texas Water Code) Mere Surplusage

36. The common law for water rate disputes with districts is almost exclusively found in Chapter 13 of the Texas Water Code because the TCEQ has exclusive jurisdiction over such rate disputes. See TEX. WATER CODE § 13.043(b)(4). Chapter 13 of the Texas Water Code was adopted to "establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities." TEX. WATER CODE § 13.001(c). Consistent with that purpose, the Legislature commanded that the TCEQ "shall ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly shall be just and reasonable" and declared that "[r]ates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customers." TEX. WATER CODE § 13.043(j).

37. Nothing in the existing common law provides that there is a presumption that rates set by a district are just and reasonable or otherwise proper "absent a showing that the district action setting the rates was arbitrary and capricious," as posed by Question 2. Such a proposition would clearly conflict with the requirement under Section 13.043(j) that the TCEQ "ensure that every rate made . . . by any retail public utility . . . shall be just and reasonable."

38. On the other hand, nothing in Chapter 13 would conflict with Section 49.2122(b) if that section "only create[s] a presumption that customer classes established by a district are properly established absent a showing that the district action establishing the classes was arbitrary and

that Section 49.2122(b) requires districts apply "appropriate reasoning" in establishing differing rates among customer classes, but it does not suggest that districts' rates are presumed appropriate in and of themselves.

C. The Consequences of Construing Section 49.2122(b) to Create a Presumption Regarding the Reasonableness and Justness of Rates Would Render the Common Law (Chapter 13 of the Texas Water Code) Mere Surplusage

36. The common law for water rate disputes with districts is almost exclusively found in Chapter 13 of the Texas Water Code because the TCEQ has exclusive jurisdiction over such rate disputes. See TEX. WATER CODE § 13.043(b)(4). Chapter 13 of the Texas Water Code was adopted to "establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities." TEX. WATER CODE § 13.001(c). Consistent with that purpose, the Legislature commanded that the TCEQ "shall ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly shall be just and reasonable" and declared that "[r]ates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customers." TEX. WATER CODE § 13.043(j).

37. Nothing in the existing common law provides that there is a presumption that rates set by a district are just and reasonable or otherwise proper "absent a showing that the district action setting the rates was arbitrary and capricious," as posed by Question 2. Such a proposition would clearly conflict with the requirement under Section 13.043(j) that the TCEQ "ensure that every rate made . . . by any retail public utility . . . shall be just and reasonable."

38. On the other hand, nothing in Chapter 13 would conflict with Section 49.2122(b) if that section "only create[s] a presumption that customer classes established by a district are properly established absent a showing that the district action establishing the classes was arbitrary and

capricious." In fact, Chapter 13 impliedly approves of such customer class discrimination as long as rates are "just and reasonable" and not "unreasonably preferential, prejudicial, or discriminatory."

TEX. WATER CODE § 13.043(j).

39. Simply put, Section 49.2122 was enacted to codify the common law by allowing districts to establish different rates among customer classes. Section 49.2122 was not enacted to make districts "immune from any rate appeals unless they are shown to be arbitrary and capricious," as noted by ALJ Card in his Order No. 3.

QUESTION 3: DOES TEXAS WATER CODE SECTION 49.2122(B) ONLY CREATE A PRESUMPTION THAT CUSTOMER CLASSES ESTABLISHED BY A DISTRICT ARE PROPERLY ESTABLISHED ABSENT A SHOWING THAT THE DISTRICT ACTION ESTABLISHING THE CLASSES WAS ARBITRARY AND CAPRICIOUS?

ANSWER: YES.

40. "Each provision must be construed in the context of the entire statute of which it is a part." *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000). More specifically, courts must "consider the entire statute, not simply the disputed portions." *Id.* Here, although Section 49.2122(a) has not been specifically included in any of the certified questions, its language provides clear legislative intent on the meaning and purpose of Section 49.2122 as a whole, including 49.2122(b). The pertinent language of Section 49.2122(a) is as follows:

Notwithstanding any other law, a district may establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate . . .

The remainder of that subsection lists the various factors that a district can consider in establishing different charges and fees among customer classes.

41. Reading Section 49.2122(a) and Section 49.2122(b) together, including the title of the entire section "ESTABLISHMENT OF CUSTOMER CLASSES," it is clear that 49.2122(b) is only meant to create a presumption for "special districts to establish differences in rates between

customer classes,” as set forth in the Preamble. Allowing districts to establish customer classes with different rates, and to consider various factors in doing so, and creating a presumption that the manner in which such rates were established among customer classes, is not the same thing as creating a presumption as to the reasonableness and justness of the rates themselves.

42. Some of the parties in the pending rate cases have noted the absence of the phrase “among classes of customers” in Section 49.2122(b), suggesting that the Legislative intent would have been more clear had it included that phrase in Section 49.2122(b). Of course, as noted above, courts must “consider the entire statute, not simply the disputed portions.” *Cont’l Cas. Ins. Co.*, 19 S.W.3d at 398. Moreover, “courts of this state have on occasion added words or phrases to statutes when necessary to give effect to legislative intent, provided the intent of the Legislature is clearly disclosed by the remainder of the statute.” *Sweeny Hosp. Dist. v. Carr*, 378 S.W.2d 40, 47 (Tex. 1964). Because the legislative intent is clearly disclosed by Section 49.2122(a) and its title, the insertion of the phrase “among classes of customers” in Section 49.2122(b) is clearly appropriate to give effect to the legislative intent, if necessary at all.

43. Based upon the foregoing, that 49.2122(b) is only meant to create a presumption for “special districts to establish differences in rates between customer classes” and thus Question 3 must be answered “Yes.”

QUESTION 4: IF THE ANSWER TO QUESTION NO. 2 IS YES, DOES TEXAS WATER CODE SECTION 49.2122(B) REQUIRE THE PETITION TO MAKE AN INITIAL SHOWING THAT THE DISTRICT’S RATE-SETTING ACTION WAS ARBITRARY AND CAPRICIOUS?

ANSWER: MOOT.

44. As set forth above, because the answer to Question 2 is “No” then Question 4 is moot and need not be answered. In the unlikely event that the Commissioners get to this question, by answering “Yes” to Question 2, then the only proper answer to Question 4 is “No,” as discussed below.

45. Question 4 is apparently derived from an issue that arose in ALJ Newchurch's Order No. 6 where he concluded that the presumption in Section 49.2122(b) relieved the MUD of its "burden of proving that its rates are just and reasonable . . . until TCR first shows that Clear Brook acted arbitrarily and capriciously." By treating the presumption and a burden of proof as the same thing, the question would arise as to which party must make the "initial showing," for the lack of a better term, to meet the applicable evidentiary hurdle: to overcome the presumption or to prove that the rates were just and reasonable.

46. Question 4 is an improper question, as discussed above, because the premise on which it is based is faulty. The faulty premise is that the "presumption" in Section 49.2122(b) creates an evidentiary barrier that must be overcome to attack the reasonableness of the rates themselves, versus the district's actions in establishing differing fees among customer classes. Because the presumption in Section 49.2122(b) only applies the *manner* in which a district may set differing rates among various customer classes, the burden of proof that "the provider of water and sewer services" must meet to show that its rates are just and reasonable under Section 13.043(j) and 30 TEX. ADMIN. CODE § 291.12 and is not affected by Section 49.2122. Therefore, districts still have to meet their initial showing, the burden of proof to show that their rates are just and reasonable.

47. Moreover, in construing the actual language of Section 49.2122(b), it is clear that nothing in that subsection changes the "burden of proof" under Section 13.043(j) and 30 TEX. ADMIN. CODE § 291.12. "Every word of a statute is presumed to have been used for a purpose." *City of Mo. City v. State ex rel. City of Alvin*, 123 S.W.3d 606, 614 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). In the context of Section 49.2122(b), the Legislature chose to use the term "presumption" not "burden of proof." There is a clear distinction in Texas law between a "presumption" and an applicable "burden of proof" to be applied in a case. The Texas Supreme Court has held that a "presumption does not constitute evidence in itself or shift the burden of

proof.” *Republic Nat’l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 558 (Tex. 1976). Thus, there is no conflict between Section 49.2122(b) and 30 TAC § 291.12, as suggested by ALJ Newchurch. Without such a conflict, Section 13.043(j) and 30 TAC § 291.12 determine which party has the burden of proof - “the provider of water and sewer services.”

48. Furthermore, a presumption is “[a]n inference in favor of a particular fact,” but “[a] presumption is not evidence.” BLACK’S LAW DICTIONARY 1185 (6th ed. 1990). Most significantly, “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.” *Id.* at 1185. Section 13.043(j) and 30 TAC § 291.12 originally casts the burden of proof on “the provider of water and sewer services.”

49. Accordingly, districts still have to make the initial showing to prove that their rates are “just and reasonable” under Section 13.043(j), irrespective of any presumption in Section 49.2122(b).

QUESTION 5: IF THE ANSWER TO QUESTION NO. 4 IS YES, IN THE CIRCUMSTANCE THAT THERE IS NO SHOWING THAT THE DISTRICT ACTION SETTING THE RATES WAS ARBITRARY AND CAPRICIOUS AND THE RATES ARE THEREFORE PRESUMED TO BE “PROPERLY ESTABLISHED,” IS THERE ANY FURTHER INQUIRY REQUIRED INTO WHETHER THE RATES THEMSELVES ARE VALID? IF SO, WHAT IS THE STANDARD UNDER WHICH THE RATES THEMSELVES MUST BE JUDGED?

ANSWER: MOOT.

50. As set forth above, because the answer to Question 2 is “No” then Question 4 is moot and need not be answered. In the unlikely event that the Commissioners answer Question 2 “Yes”, and Question 4 “Yes”, then the only proper answers to Question 5 are “Yes,” and that the district’s rates must be proved to be just and reasonable by a preponderance of the evidence.

51. Again, just like Question 4, Question 5 is an improper question because the premise on which it is based is faulty. The faulty premise is that the “presumption” in Section 49.2122(b)

creates an evidentiary barrier that must be overcome to attack the reasonableness of the rates themselves, versus the district's actions in establishing differing fees among customer classes. Because the presumption in Section 49.2122(b) only applies to the manner in which a district may set differing rates among various customer classes, the burden of proof that "the provider of water and sewer services" must meet to show that its rates are just and reasonable is not affected by Section 49.2122. Therefore, districts still have to meet their initial showing, the burden of proof to show that their rates are just and reasonable pursuant to Section 13.043(j).

QUESTION 6: IF THE ANSWER TO QUESTION NO. 2 IS YES, IS THE PETITIONER REQUIRED TO MAKE THE INITIAL SHOWING THE DISTRICT'S RATE-SETTING ACTION WAS ARBITRARY AND CAPRICIOUS WHETHER THE RATE WAS AFFECTED IS FOR RETAIL SERVICE, WHOLESALE SERVICE, OR RAW WATER?

ANSWER: MOOT.

52. As set forth above, because the answer to Question 2 is "No" then Question 6 is moot and need not be answered. In the unlikely event that the Commissioners get to this question, by answering "Yes" to Question 2, then the only proper answer to Question 6 is "No," for the same reasons discussed above with respect to Question 4. As to any distinction with respect to retail service, wholesale service, or raw water, TCR has no position but asserts that the answer is certainly "No" as to retail service.

PRAYER


WHEREFORE, PREMISES CONSIDERED, Petitioner, TCR MEADOW LIMITED PARTNERSHIP, prays that for the reasons stated above, that the Commission answer Question 1 "No," answer Question 2 "No," answer Question 3 "Yes," and refuse to answer the remaining questions as being moot, that a public hearing be set on the Certified Questions and issues presented in this Brief, and that Petitioner, TCR MEADOW LIMITED PARTNERSHIP receive such other and further relief, general and special, both at law and equity, to which it may show itself to be justly entitled.

Respectfully submitted,

**TCR MEADOW LIMITED
PARTNERSHIP**

By, and through, its attorneys of record:

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MEADOW LIMITED PARTNERSHIP**

CERTIFICATE OF SERVICE

I certify that on the 12th day of June, 2009, a true and correct copy of TCR Meadow Limited Partnership's Brief to the Commissioners on Six Certified Questions Regarding Texas Water Code § 49.2122 was served as follows:

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QUALITY

DYLAN B. RUSSELL

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CHARLES BACARISSE
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MAY 04 2005

By Harris County, Texas
 Deputy

CAUSE NO. 2004-21026

TCR HIGHLAND MEADOW LIMITED	§	IN THE DISTRICT COURT OF
PARTNERSHIP	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
CLEAR BROOK CITY MUNICIPAL	§	
UTILITY DISTRICT	§	334 th JUDICIAL DISTRICT

FINDINGS OF FACT & CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court without a jury on April 13, 2005 for the limited purpose of a determination by the Court whether Clear Brook City Municipal Utility District's charges for water service provided to TCR Highland Meadow Limited Partnership are arbitrary. Clear Brook City MUD ("the District"), its attorney, TCR Highland Meadow Village L.P. ("TCR"), its attorney, and representatives of the District and TCR were present. After considering the pleadings, the evidence, and the argument and briefs from counsel, the Court makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The District is a political subdivision of the state, created pursuant to Chapter 54 of the Texas Water Code and the Texas Constitution.
2. The District provides water, sewer, law enforcement, fire protection parks/recreational and other services to customers within its service area.
3. Plaintiff TCR opened the Highland Meadow Village apartment complex ("the Apartments") located within the District's service area in September 2000. The complex has approximately 250 units.
4. The Apartments are low-income housing in that their rents are capped at an amount set by the Internal Revenue Code. The total amount of rent that can be paid by the unit lessees includes water and other utility charges as well as rent. Thus, TCR cannot derive revenue from the water and other utility charges, only the rent portion of the total amount of rent charged.

EXHIBIT A

5. On June 22, 2000, the District adopted a rate order that charged users for water as follows:
- a. Apartments (non-individually metered) – \$25.00 for each occupied unit until occupancy reached 80%, then \$25.00 per unit, with water used in excess of 7,000 gallons per unit charged billed under the following escalating scale:
 - i. First 7,000 gallons times number of units billed (\$25.00 minimum per unit as above)
 - ii. Next 3,000 gallons: \$1.25 per thousand gallons.
 - iii. Next 5,000 gallons: \$1.75 per thousand gallons.
 - iv. Next 10,000 gallons: \$2.50 per thousand gallons.
 - v. All over 25,000 gallons: \$3.00 per thousand gallons.
 - b. Commercial:
 - i. First 7,000 gallons: \$20.00
 - ii. Next 3,000 gallons: \$1.50 per thousand gallons.
 - iii. Next 5,000 gallons: \$2.00 per thousand gallons.
 - iv. Next 10,000 gallons: \$2.75 per thousand gallons.
 - v. All over 25,000 gallons: \$3.25 per thousand gallons.
 - c. Residential:
 - i. First 7,000 gallons (\$25.00 as above)
 - ii. Next 3,000 gallons: \$1.25 per thousand gallons.
 - iii. Next 5,000 gallons: \$1.75 per thousand gallons.
 - iv. Next 10,000 gallons: \$2.50 per thousand gallons.
 - v. All over 25,000 gallons: \$3.00 per thousand gallons.
6. Under the rate orders in effect since August 5, 1993 through the June 22, 2000 order, the District's minimum charge for water service to apartments was \$20.00 for each occupied unit until occupancy reached 80%, then \$20.00 per unit, with water used in excess of 7,000 gallons per unit charged billed under the same escalating scale used in the June 22, 2000 order.
7. The District's October 9, 2003 rate order for water service to apartments provides that the \$25.00 minimum charge applies to each unit without regard to occupancy, and established the following escalating rate scale for service to apartments:
- a. First 7,000 gallons times number of units (\$25.00 minimum per unit as above)
 - b. Next 10,000 gallons: \$1.25 per thousand gallons.
 - c. Next 15,000 gallons: \$1.75 per thousand gallons
 - d. Next 25,000 gallons: \$2.50 per thousand gallons
 - e. All over minimum plus 50,000 gallons: \$3.00 per thousand gallons.
8. The rates for commercial and single family users were not changed by the October 9, 2003 rate order.

9. The District's rates for water usage established in the October 9, 2003 rate order are in effect at present.
10. All apartment complexes within the District have been subject to the same water rate structure at the same time each was applied to TCR, and the District has not treated different apartment complexes differently in terms of water service or rates.
11. The testimony uniformly established that at the time of the June, 2000, rate increase, the sole motivating factor for the Board of the District was a need for an increase in general revenue. The District was experiencing a "funding crisis."
12. The Board did not consider or evaluate the cost of providing water services to the various classifications of customers in assessing the new rates. In fact, in the 15 rate orders since June, 2000, the decisions of the Board have not been supported by any factual data or rate study. The District's counsel admits, however, that the cost of providing water services to both apartments and single family homes is probably about the same.
13. The Board determined that, despite the funding crisis, it would not raise revenue through taxes -- which would necessarily implicate an across-the-board increase to all customers in the District. This decision was motivated, at least in part, by Board members' prior promises to the community not to do so and a desire to be re-elected.
14. The Board saw that apartment complexes were paying less in *ad valorem* taxes when compared to other property owners and determined to raise revenue through greater water rates to Plaintiff and other apartments within the District.
15. In other words, the Board concluded that because apartments in the District provide less revenue through taxes, apartments need to pay higher water rates to "establish equity." The District neither had nor sought any data that would show that the apartments within the District were not paying their fair share for services.
16. The District argues that its rates not illegal or arbitrary because of its present conclusions that, *i.e.*,
 - a. Apartment residents use water differently than single family residents.
 - b. Apartments typically have fewer occupants and fewer bathrooms and plumbing fixtures than single family residences.
 - c. Apartment dwellers do not water landscaping like residential users and single family users generally use more water than apartment dwellers, particularly in the summer.
 - d. Apartment users typically do not exceed the minimum amount of water used, but greater usage by single family residences often pushes single family users over the minimum amount, particularly in the summer. Higher volume usage by single family homes results in greater revenue for the District per home and per gallon of

water sold as the higher rate bands apply to the higher usage, and the District does not receive this greater revenue from apartments like TCR that typically use less than the minimum amount of water.

- e. Car washing is prohibited at the apartments.
 - f. Not all apartment dwellers have washers in their units and therefore are more likely to wait to collect larger washloads than wash smaller loads more frequently, using more water.
 - g. Vacancy rates are different between apartments and single family homes.
 - h. The District also easily knows which single family residences are not occupied by seeing no water use or having service terminated, but must rely on the self reporting of TCR to determine which apartments may be vacant and unoccupied since there is a master meter.
17. It could be that apartments and single family residences with the District use different levels of and generate different amounts of financial support for fire protection and law enforcement services provided by the District; but the District did not investigate this assumption or consider this fact in setting its rates.
18. It could be that apartment residences disproportionately use more fire and law enforcement services provided at the expense of the District than single family residences, but apartment customers provided the District with less funds for fire and law enforcement services than single family residents before the rate order change in June 2000; but the District did not investigate this assumption or consider this fact in setting its rates.
19. Even if the Apartments use fire services disproportionately, the District does not explain its failure to adjust the water rate once it created a separate line item for fire service.
20. To the extent any of the Court's conclusions of law are determined to be findings of fact, they are adopted here as if fully set forth.

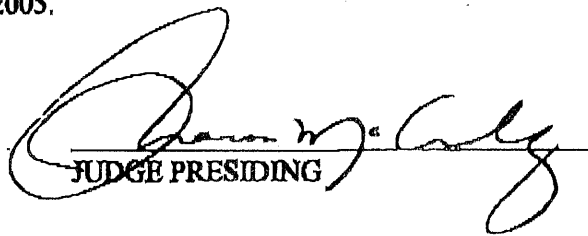
CONCLUSIONS OF LAW

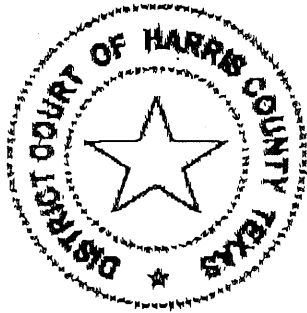
1. Because the District was created pursuant to article XVI, Section 59, of the Texas Constitution, TEX. WATER CODE ANN. § 54.011 (Vernon Supp. 2004), it has a duty to exercise judgment and discretion.
2. This Court is charged solely with making a determination whether the District has acted illegally, unreasonably, or arbitrarily. *See Inverness Forest Improvement District v. Hardy Street Investors*, 541 S.W.2d 454, 460 (Tex.Civ.App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

3. The District "may adopt and enforce all necessary charges, mandatory fees, or rentals, in addition to taxes, for providing or making available any district facility or service []." TEX. WATER CODE ANN. § 49.212
4. The purpose for charges or fees under § 49.212 is "for providing or making facilities or services available." The Code does not authorize the District to use charges or fees for the purpose of filling gaps in the general revenue.
5. The District has the right to place consumers within reasonable classifications for purposes of assessing fees or charges based upon such factors as the cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction. *See Caldwell v. City of Abilene*, 260 S.W.2d 712, 714-15 (Tex.Civ.App.—Eastland 1953, writ refused).
6. Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material billing factor which may justify "discrimination" between categories of customers. *See, e.g. Ford v. Rio Grande Valley Gas Co.*, 174 S.W.2d 479, 480 (Tex. 1943).
7. Such discrimination is arbitrary, however, when it has no factual basis or justification. *See Caldwell v. City of Abilene*, 260 S.W.2d 712, 715 (Tex.Civ.App.—Eastland 1953, writ refused).
8. With regard to the June, 2000, rate increase, the District had no factual basis or support for discriminating between the categories of customers. This is not to say that such a basis or foundation does not or could not exist; the District simply did not look.
9. The District cannot now bolster or shore-up a decision lacking foundation when made. The weight of the credible evidence supports a finding that the District did not consider the appropriate factors when making its June, 2000, rate decision.
10. Moreover, although the District has the right to earn a reasonable profit on its water service, the rates must nonetheless be reasonably related to the cost of the services rendered. *See South Texas Public Service Co. v. Jahn*, 7 S.W.2d 942, 945 (Tex.App. — Austin 1928, writ refused).
11. Again, with regard to the rate scale from June, 2000, and beyond, the rates cannot be reasonably related to the cost of the services rendered because the District did not and has not considered the actual cost of the services rendered.
12. Thus, Plaintiff TCR has met its heavy burden to establish that the District's water rates bear no relationship to the District's expenses in providing apartments with services.

13. It is unlawful for the District to base its water rate decisions, as it did in June, 2000, solely upon the difference in *ad valorem* revenues generated by apartment units compared to other classifications of users in setting the rates that distinguished among different classes of users.
14. The Court finds that for the District to act arbitrarily is not the equivalent of acting cavalierly, as many witnesses assumed. The District did not act cavalierly. The District had a crisis -- not of its Board's making -- and responded in a way it felt was fair to all property owners in the District.
15. However, because the District used its authority to set rates and charges to correct a perceived inequity in the tax structure, it acted arbitrarily and illegally.
16. To the extent any of the Court's findings of fact are determined to be conclusions of law, they are adopted here as if fully set forth.

SIGNED this 4th day of May, 2005.


JUDGE PRESIDING



I, Theresa Chang, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date
Witness my official hand and seal of office
this August 19, 2008

Certified Document Number: 12400696 Total Pages: 6

THERESA CHANG, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

REQUEST FOR ADMISSION NO. 12

The MUD's costs and expenses in providing water and sewer services to single-family residential users and apartment unit users are approximately the same.

ADMIT OR DENY: Given that Tex. Water Code § 49.2122 presents a threshold issue on which Petitioner has the burden of proof, Respondent objects to the request because it is not relevant to the issue of whether Respondent acted arbitrarily and capriciously in its adoption of the order. Without waiving its objections, Respondent admits.

REQUEST FOR ADMISSION NO. 13

The MUD's costs and expenses in providing water and sewer services to single-family residential users and apartment unit users are the same.

ADMIT OR DENY: Given that Tex. Water Code § 49.2122 presents a threshold issue on which Petitioner has the burden of proof, Respondent objects to the request because it is not relevant to the issue of whether Respondent acted arbitrarily and capriciously in its adoption of the order. Subject to and without waiving the foregoing objections, Respondent denies.

REQUEST FOR ADMISSION NO. 14

The MUD's costs and expenses in providing water and sewer services to single-family residential users are more than for apartment unit users.

ADMIT OR DENY: Given that Tex. Water Code § 49.2122 presents a threshold issue on which Petitioner has the burden of proof, Respondent objects to the request because it is not relevant to the issue of whether Respondent acted arbitrarily and capriciously in its adoption of the order. Subject to and without waiving the foregoing objections, Respondent admits.

REQUEST FOR ADMISSION NO. 15

The MUD's costs and expenses in providing water and sewer services to apartment unit users are less than for single-family residential users.

ADMIT OR DENY: Given that Tex. Water Code § 49.2122 presents a threshold issue on which Petitioner has the burden of proof, Respondent objects to the request because it is not relevant to the issue of whether Respondent acted arbitrarily and capriciously in its adoption of the order. Subject to and without waiving the foregoing objections, Respondent admits.

REQUEST FOR ADMISSION NO. 16

The MUD has the burden to prove that the rate increase in the Order is just and reasonable.

ADMIT OR DENY: Deny.

EXHIBIT B

ARCHIVED BROADCAST TRANSCRIPTION

Regular Session Broadcasts between 1:14:18 – 1:20:32

Committee on Natural Resources

The following is transcription by

Bernadette Denmon

August 15, 2008

EXHIBIT C

Committee on Natural Resources – March 28, 2007

Mr. Fuente:

Chair calls House Bill (HB) 2301 by Rep. Talton.

Mr. Talton:

Thank you Mr. Chairman. You've called up HB 2301?

Mr. Fuente:

Yes.

Mr. Talton:

Mr. Chairman, members of the committee, there is a need for clarification of law that regulates how Municipal Utility Districts in the State of Texas are able to establish rates that are charged on revenues. Specifically, there was the Clear Brook City Municipal Utility District (MUD). There was a shortage of funds available to provide a service, and in this case it was water, and they decided to do a rate charge to ~~different customer classes for water~~. They had deemed that that was fair, just like cities do when they deem something as an emergency and you can't go behind it and change that. And that's the way case law has always been; So the district did the same thing and then one of the projects...one of the apartment projects sued and said it was improper. The Court and (in?) Harris County said it is not set out in law what you can and can't do and you don't have any statutory authority to do it, even though Section of the Water Code 49.212 allows MUDs to generate revenue through rate charges for its services. And it's always been a practice apparently to differentiate between classes of services and ~~what this bill does is it codifies 49.212 by codifying basically current law~~, and I have one witness that I'm aware of.

Mr. Fuente:

Any questions for Mr. Talton? Chair calls P. Ashley Calahan.

My name is Ashley Calahan and I'm an attorney with Fulbright & Jaworski. We represented Clear Brook MUD in the litigation that led to the filing of this bill and we would reiterate what Rep. Talton said. This bill just codifies what is current practice across the State by the MUDs and gives some standards which can head off some unnecessary litigation and give some guidance for the courts in that litigation which cannot be avoided.

Mr. Fuente:

You said there is some litigation ongoing right now?

Mr. Calahan:

There's none that I'm aware of. There was a case which was actually resolved by agreement following an adverse ruling.

Mr. Fuente:

So we're not affecting any litigation right now?

Mr. Calahan:

Not to my knowledge, not that I believe so.

Mr. Fuente:

Any questions for Mr. Calahan? Mr. Oday?

Mr. Oday:

Mr. Calahan, it looks like you've got classifications for parks and those types of other entities. Is this strictly for the water costs or utility costs for these particular classifications that you are trying to determine?

Mr. Calahan:

That is my understanding...is that it would be for setting the water cost. I don't want to over-speak my knowledge, Rep. Oday. It is my understanding this is solely limited to water charges and fees...that would apply to any fees that the MUD is authorized to assess, but I believe the genesis of this was the water fee.

Mr. Fuente:

Did your firm participate in drafting this legislation?

Mr. Calahan:

I believe they did, but the extent to which they did, I cannot say. I personally have no knowledge of what we specifically did.

Mr. Fuente:

But you did not?

Mr. Calahan:

No, I did not. I cannot speak for what other people did.

Mr. Fuente:

But maybe you can answer this question anyway. On page 2, line 13.

Mr. Calahan:

Yes, sir?

Mr. Fuente:

Is there any problem...the language says a District is presumed to have weighed and considered appropriate factors to establish the charges. So there is a presumption that they did. What if we just required them to do that? That they *shall* weigh and consider appropriate factors?

Mr. Calahan:

It would have the same effect and so you would be guaranteeing at that point that they did, as opposed to presuming it. That would be my off-the-cuff answer.

Mr. Fuente:

That's a lawyer there and so I'll talk to him about it.

Any other questions for Mr. Calahan? Mr. Talton? Mr. Oday?

Would anyone like to comment on, for, or against House Code 2301?

The chair calls Mr. Talton to close.

Mr. Talton:

Thank you, Chairman Fuente.

Rep. Oday, what this does and the reason this was set up is to apply for any services that the MUD does...that's the answer. Because under 212 they can do it now, and all I'm trying to do is clarify that they can do it. And on the second question that the Chairman asked, and what they are trying to do here on the B-portion on page 2, line 13 they are trying to save up like cities do when they declare an emergency and they don't have to go out for bid prices because it's an emergency and nobody can go behind, and that's what they're trying to do here, whenever they say it's a presumption; and as you know in law, we can overcome presumptions if they show that they were discriminatory or arbitrary or whatever they do...and ~~what we're trying to do is to clarify what case law was~~. That's kind of what we're trying to do.

Mr. Fuente:

Any questions for Mr. Talton?

Mr. Talton:

And it's not for the battleship. Thank you.

Mr. Fuente:

House Bill 2301 is left pending.

Thank you, sir.

BILL ANALYSIS

H.B. 2301
By: Talton
Natural Resources
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Currently, the water rate structure is unfairly different for apartment complexes versus single family residences. The fair establishment of water rates ensures that all of the district's customers pay an equitable share of the expenses for the services provided by the district.

HB 2301 would allow a district to establish different fees among classes of customers based on any factor the district considers appropriate.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1. Subchapter H, Chapter 49, Water Code is amended by adding Section 49.2122:

- a) Adds that a district may establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate.
- b) Presumes that a district has weighed and considered appropriate factors and has properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.

EFFECTIVE DATE

Upon passage, or, if the Act does not receive the necessary vote, the Act takes effect September 1, 2007.

H.B. 2301 BQ(R)

By: Talton

H.B. No. 2301

A BILL TO BE ENTITLED

AN ACT

1
2 relating to the ~~authority of certain special districts to establish~~
3 ~~differences in rates between customer classes.~~

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Subchapter H, Chapter 49, Water Code, is amended
6 by adding Section 49.2122 to read as follows:

7 Sec. 49.2122. ESTABLISHMENT OF CUSTOMER CLASSES. (a)
8 Notwithstanding any other law, a district may establish different
9 charges, fees, rentals, or deposits among classes of customers that
10 are based on any factor the district considers appropriate,
11 including:

12 (1) the similarity of the type of customer to other
13 customers in the class, including:

14 (A) residential;

15 (B) commercial;

16 (C) industrial;

17 (D) apartment;

18 (E) rental housing;

19 (F) irrigation;

20 (G) homeowner associations;

21 (H) builder;

22 (I) out-of-district;

23 (J) nonprofit organization; and

24 (K) any other type of customer as determined by

H.B. No. 2301

1 the district;

2 (2) the type of services provided to the customer
3 class;

4 (3) the cost of facilities, operations, and
5 administrative services to provide service to a particular class of
6 customer, including additional costs to the district for security,
7 recreational facilities, or fire protection paid from other
8 revenues; and

9 (4) the total revenues, including ad valorem tax
10 revenues and connection fees, received by the district from a class
11 of customers relative to the cost of service to the class of
12 customers.

13 (b) A district is presumed to have weighed and considered
14 appropriate factors and to have properly established charges, fees,
15 rentals, and deposits absent a showing that the district acted
16 arbitrarily and capriciously.

17 SECTION 2. This Act takes effect immediately if it receives
18 a vote of two-thirds of all the members elected to each house, as
19 provided by Section 39, Article III, Texas Constitution. If this
20 Act does not receive the vote necessary for immediate effect, this
21 Act takes effect September 1, 2007.

**TALKING POINTS
HB 2301 by TALTON**

Mr. Chairman, members of the Committee, there is a need for the clarification of the intent of law regulating Municipal Utility Districts in the State of Texas' means establishing rates charged to garner revenue as current law is ambiguous as to how MUD's may go about generating sufficient revenue to operate.

In the case of the Clear Brook City Municipal Utility District, there was a shortage of funds available for the MUD to provide its services. The MUD sought to alter the rate charges to apartment complexes for water. The MUD deemed this a fair way to adequately meet its revenue needs, but also evenly distribute the burden, as home owners bare a heavy burden for water rates, while utilizing substantially lower amounts of other services provided by the MUD.

However, the Clear Brook City Municipal Utility District's rate change was alleged to be illegal under a law suit filed by a resident in the MUD. The 334th Judicial District Court of Harris County, Texas disallowed the rate under its interpretation of current law because the change was based upon charging certain classes of customer differing rates. Currently, Section 49.212 of the Water Code allows MUD's to generate revenue through rate charges for its services. It is a general practice for districts to differentiate between classes of service, and Clear Brook believes that it would have ultimately prevailed upon appeal. However, the issue at hand was whether it is legal to charge differing groups of customers different rates based upon usage.

HB 2301 seeks to clarify Section 49.212 by codifying current law governing the ability of MUD's to charge differing rates to different classes of customers. This allows for MUD's to reconp revenue from classes of customers which utilize disproportionate levels of services, by balancing the charges between customer classes to reflect the level of use equitably.

Important in establishing equitable distribution of rates and taxes to customers, HB 2301 does not allow for MUD's to raise rates arbitrarily

by requiring appropriate reasoning to be employed in restructuring rates between customer classes.

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DATE: June 12, 2009

HS FILE NO: 151243-129

FROM: Dylan B. Russell

 RE: Administrative Law Judges' Request to Answer Certified Questions;
 SOAH Docket No. 582-08-1700; TCEQ Docket No. 2008-0091-UCR
TCR Highland Meadow Limited Partnership v. Clear Brook City Municipal
Utility District; Before the State Office of Administrative Hearings

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